Supreme Court, U.S.
FILED
AUG 30 1994
OFFICE OF THE CLERK

(4)

No. 93-1767

IN THE
Supreme Court of the United States

October Term, 1994

FRANK ATONIO, ALAN LEW, CURTIS LEW, JOAQUIN ARRUIZA, RANDY DEL FIERRO, CLARKE KIDO, LESTER KURAMOTO, BARBARA VIERNES, as administratrix of the Estate of Gene Allen Viernes, MARGARET BACLIG, as administratrix of the Estate of Eugene Baclig, and all others similarly situated,

Petitioners,

v.

WARDS COVE PACKING COMPANY, INC., CASTLE & COOK, INC., COLUMBIA WARDS FISHERIES and UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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August 30, 1994

aBCD Legal Printers, Seattle, WA

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ARGUMENT

Notably absent from the Government's brief is any assertion that the §402(b) exemption fulfills the guarantee of equal protection implicit in the Fifth Amendment. In fact, the Government acknowledges that *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) -- the case the Court of Appeals "relied primarily on" (Brief of United States p. 7) -- does "not fully address[ ] or answer[ ]" the questions posed here (*id.* at 8).

Similarly absent from the Government's brief is any assertion that the equal protection issue falls short of the criteria for certiorari.

Significantly, the Government does not argue (as do the employers) that the narrowness of the §402(b) exemption suggests the absence of an issue of national importance. In fact, it is the narrowness of the exemption which is part of the constitutional vice. If the importance of the issue were measured by the scope of the exemption, then the classifications most in need of review would never be eligible for review by certiorari. *Cf. News America Publishing, Inc. v. F.C.C.*, 844 F.2d 800, 813 (D.C. Cir. 1988) ("Nowhere are the protections of the Equal Protection Clause more critical than when legislation singles out one or a few for disfavored treatment.")

While the Government does say the separation of powers challenge lacks merit, its argument on this issue is limited to a one-sentence footnote. (Brief of United States p. 8 n.2.)

The Government suggests the Court "remand[ ] for reconsideration in light of *Landgraf [v. USI Film Products*, 114 S.Ct. 1483 (1994)] and *Rivers [v. Roadway Express, Inc.*, 114 S.Ct. 1510 (1994)]. But if the Court accepts the Government's suggestion, it will likely find the parties before it once again in virtually the same posture one or two years from now. This case has already been pending twenty years without a conclusive ruling on liability. Additional delay would not serve anyone's interest.

The Court should grant certiorari to address the issues the employees raise in their petition.

If, however, the Court does remand for reconsideration in light of *Landgraf* and *Rivers*, it should also remand for reconsideration of the equal protection issue in light of the comments the Government makes in its brief.

DATED: August 30, 1994.

Respectfully submitted,

Abraham A. Arditi
Attorney for Petitioners